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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FRED SCALF,

Defendant and Appellant.

D049402

(Super. Ct. No. SCD193673)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielsen, Judge. Affirmed.

Fred Scalf entered negotiated guilty pleas to two counts of engaging in lewd and lascivious conduct with a minor under the age of 14 years. (Pen. Code, § 288, subd. (a).)<sup>1</sup> He admitted having substantial sexual conduct with the victim. (§ 1203.066, subd. (a)(8).) The court sentenced him to prison for eight years: the six-year middle term on

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<sup>1</sup> All statutory references are to the Penal Code.

one count with a consecutive two years on the second (one-third the middle term). Scalf contends the trial court abused its discretion in denying probation.

### FACTS

When eight-year-old A. was in the third grade, her family, including her stepfather Scalf, moved from Tijuana to Imperial Beach. While they lived in Imperial Beach, Scalf touched A. under A.'s clothing in the genital area, the breasts, and on her buttocks. When Scalf spoke with law enforcement, he maintained A. rubbed her body against his hand and he had no sexual desire for her. He admitted A. climbed into his bed and his penis was probably hard. It possibly touched her buttocks.

A psychologist who examined and evaluated Scalf diagnosed him as "Pedophilia, Sexually Attracted to Females, Limited to Incest . . . ." The psychologist found Scalf had a low-moderate level of reoffending and recommended he be placed on probation.

### DISCUSSION

Scalf contends the trial court abused its discretion in not placing him on probation. "Probation is an act of leniency, not a matter of right." (*People v. Walmsley* (1985) 168 Cal.App.3d 636, 638.) The decision to grant or deny probation requires consideration of all the facts and circumstances of the case. (*People v. Axtell* (1981) 118 Cal.App.3d 246, 256.) Among the factors to be considered is whether the failure to incarcerate the defendant "would unduly depreciate the seriousness of the crime." (*Id.* at p. 255; see also *People v. Bolton* (1979) 23 Cal.3d 208, 217.)

Generally, Penal Code section 1203.066, subdivision (a)(8) prohibits granting probation to a defendant who had substantial sexual conduct with a minor under 14 years

of age. When Scalf committed the crimes here, section 1203.066 provided in pertinent part:

"(a) Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for, any of the following persons:

[¶] . . . [¶]

"(8) A person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age.

[¶] . . . [¶]

"(c) Paragraphs (7), (8), and (9) of subdivision (a) shall not apply when the court makes all of the following findings:

"(1) The defendant is the victim's natural parent, adoptive parent, stepparent, relative, or is a member of the victim's household who has lived in the victim's household.

"(2) A grant of probation to the defendant is in the best interest of the child.

"(3) Rehabilitation of the defendant is feasible, the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence.

"(4) The defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by returning the defendant to the household of the victim. While removed from the household, the court shall prohibit contact by the defendant with the victim, except the court may permit the supervised contact, upon the request of the director of the court ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant. As used in this paragraph, 'contact with the victim'

includes all physical contact, being in the presence of the victim, communication by any means, any communication by a third party acting on behalf of the defendant, and any gifts.

"(5) There is no threat of physical harm to the child victim if probation is granted. The court upon making its findings pursuant to this subdivision is not precluded from sentencing the defendant to jail or prison, but retains the discretion not to do so. The court shall state its reasons on the record for whatever sentence it imposes on the defendant."

At the sentencing hearing, the trial court found that Scalf met the first three conditions of section 1203.066, subdivision (c), but not the fourth condition. The trial court said:

"The analysis of the disposition of this case is initially governed by Penal Code section 1203.066(c). That section requires the Court to send this gentleman to prison, unless five separate findings are made. [¶] The findings in this case are positive with respect to a number of these particular criteria: [¶] The first, he is of an appropriate relationship where probation could be considered. The first criteria is met. [¶] The second criteria that I will consider is whether or not rehabilitation of the defendant is feasible. I think in light of Dr. Reavis's report, and I think the rather clear reasoning in Dr. Reavis's report, I think there is a very good likelihood that this gentlemen could be treated. [¶] The third criteria is that he would be removed from the household of the victim, and that of course would be easily accomplished, so that's positive. [¶] I think Dr. Reavis's report does indicate that there is no threat of physical harm to the child if probation is granted in this case. [¶] And that brings us, then, to the final criteria, and that is whether or not a grant of probation to this defendant is in the best interest of the child.

"In this case, I think Mr. Scalf has helped make this decision quite easy, in all frankness. Mr. Scalf has conducted himself I think throughout the pendency of this case and his evaluation with fundamental dishonesty. He has blamed the child for these events happening. He has blamed the child's mother for these events happening. He has waffled in what he did and the explanation of it, and he has manipulated the truth to try to make himself look good,

and no matter what the truth is at this point, it does appear to me that he is dishonest and he has attacked the integrity of this child. First he attacked the physical integrity of the child, and now he attacks her again. It is, frankly, reprehensible. [¶] It leaves a small child wondering what she did to deserve this. And the answer is clear: Nothing.

"I find it interesting that this is not in a sense, in some ways, easily categorized as the efforts of a pedophile, although I believe it is, because Mr. Scalf offers the explanation that he did this to get back at this child's mother; that this was something that was not for his own interest or sexual satisfaction, but, in fact, simply a way to express his anger. And, frankly, if that's even remotely true, that makes this an even worse crime, in this opinion. It wasn't something, if that's true, that was compelled by an illness.

"I think the best interest of the child in this case is to make it clear that he is a criminal, that he is a criminal worthy of prison, and that she did nothing wrong. She can move on with her life, knowing that she was innocent, and he, in fact, was the criminal. [¶] Probation is denied."

Scalf argues the trial court abused its discretion in refusing to place him on probation because he had no criminal record, admitted wrongdoing at an early stage of the proceedings, and the examining psychologist recommended he be placed on probation. However, absent a clear showing the decision is arbitrary or irrational, it is presumed the trial court acted to achieve legitimate sentencing objectives. (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) A decision denying probation will be upheld absent a clear showing the trial court's determination is arbitrary or capricious. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 364-365.) Here, Scalf was presumptively ineligible for probation. Both the nature of the offenses and the interest of justice support denial of probation.

Scalf notes that section 1203.066 was amended in 2005 and claims there is a question whether the trial court relied on the proper factors.<sup>2</sup> However, he acknowledges that "the new wording appears to indicate the trial court's concern for the victim and whether she would feel that she truly was a victim absent appellant's commitment to state prison was a proper factor for the court to consider." Even if the presumption expressed in section 1203.66 did not apply, a trial court has broad discretion to grant probation. (*People v. Lafantasie* (1986) 178 Cal.App.3d 758, 761.) The exercise of discretion must be neither arbitrary nor capricious, must be impartial, and must be guided and controlled by fixed legal principles. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) Protection of the public, the nature of the offense, the interest of justice, reintegration of the offender

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<sup>2</sup> As amended in 2005, section 1203.066 subdivision (d)(1) provides:

"If a person is convicted of a violation of Section 288 or 288.5, and the factors listed in subdivision (a) are not pled or proven, probation may be granted only if the following terms and conditions are met: [¶] (A) If the defendant is a member of the victim's household, the court finds that probation is in the best interest of the child victim. [¶] (B) The court finds that rehabilitation of the defendant is feasible and that the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence. [¶] (C) If the defendant is a member of the victim's household, probation shall not be granted unless the defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by his or her return. While removed from the household, the court shall prohibit contact by the defendant with the victim, with the exception that the court may permit supervised contact, upon the request of the director of the court-ordered supervised treatment program, and with the agreement of the victim and the victim's parent or legal guardian, other than the defendant. [¶] (D) The court finds that there is no threat of physical harm to the victim if probation is granted."

into the community, and the defendant's needs shall be primary considerations. (Pen. Code, § 1202.7). The trial court did not have to follow the psychologist's recommendation. (See *People v. Warner, supra*, 20 Cal.3d at p. 683.) Denial of probation was not arbitrary or capricious.

DISPOSITON

The judgment is affirmed.

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HUFFMAN, J.

WE CONCUR:

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McCONNELL, P. J.

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HALLER, J.